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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY DARNELL CLEMONS,

Defendant and Appellant.

B169077

(Los Angeles County
Super. Ct. No. YA052497)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Laura C. Ellison, Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and
Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Rodney Darnell Clemons appeals from the judgment entered upon his conviction by jury of second degree murder in which he personally and intentionally used and discharged a firearm, causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (c) & (d).) He was sentenced to prison for 15 years to life with a 25-year-to-life firearm enhancement. He contends that there is insufficient evidence of malice to support his conviction of second degree murder. We affirm.

FACTS

Prosecution Evidence

We view the evidence in accordance with the usual rules on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) On the evening of July 23, 2002, Samyah Ralls and Keisha Fisher (Keisha) got into an argument in front of the Los Angeles home Keisha shared with her husband, Andre Fisher (Andre), the murder victim. Andre, the father of Keisha's children, was also the father of Ralls's unborn child. After the argument, Ralls drove off and picked up three other women, Myesha Pretlow, Pretlow's aunt, and codefendant Yannick Carraway.

The four women approached the Fisher apartment. Andre and Keisha came out, and a loud argument ensued. Keisha had had a prior confrontation with Carraway and did not like her. Carraway yelled that Andre was "messing around" and had gotten Ralls pregnant, and she stated that Andre was a punk and he was going to be with Ralls, not Keisha. Keisha made a remark about the sexual preference of Carraway, who was in a lesbian relationship with Andre's sister, Mikel. Carraway said that she was going to fight Keisha because Ralls was pregnant. Although Andre urged the women to leave, Carraway charged at Keisha and they began fighting. The fight lasted five to 10 minutes, during which Keisha bit Carraway and banged Carraway's head on the concrete driveway. Andre did not like Carraway, who was dating his sister Mikel, and he told Keisha to "whip [Carraway's] ass," although he did not get physically involved. Finally, Andre and a neighbor, Nichole Fowler, broke up the fight. Carraway said, "It's not over.

We be back.” Mikel, who had been summoned by Andre, arrived after Carraway and her companions left.

After Carraway went to a hospital to get a tetanus shot, she made a phone call and then told Ralls that she wanted to pick up her cousin, Bug, and go back to the Fishers’ house to fight Keisha again. Pretlow’s aunt went home, and Ralls, Pretlow and Carraway stopped at the home of appellant’s friend Donald Pleasant, known as Milk. Appellant was there, and Carraway spoke with appellant out of earshot of Ralls.¹ Appellant then asked Ralls whether Andre was the father of her baby. Ralls said yes. Appellant got into the car and the four drove to the Fishers’ residence, followed in another car by Milk. Ralls recalled hearing statements indicating that ““they’re going to fight him,”” meaning Andre.

When they arrived, Carraway and Ralls called the Fishers from a cell phone and told Keisha to come out. Keisha went outside with Andre, Mikel, and Fowler, the neighbor. Carraway said, referring to appellant, ““This is my brother, Bug, and I brought him over here . . . to mess you up.”” Appellant walked up and asked Andre what was happening, inquiring about “the guy [who] was involved in fighting with [Carraway].” The two men stood about a foot and a half apart. Andre told appellant that the fight had been between the women, explaining that Carraway and Mikel “were together,” that the fight had nothing to do with Carraway or Mikel, and that Carraway was fighting on behalf of her friend, Ralls. Fowler testified that appellant looked at Andre “like that’s not what he thought he was over there for.” Andre asked appellant if he was there to fight with him or to cause him harm, and appellant said no.

Appellant pulled a gun from his waistband and passed it to Milk. Milk walked to one of the cars and bent into the car. Fowler assumed that he placed the gun in the vehicle, because she did not see him holding it when he walked back from the car. Andre

¹ Pretlow did not testify.

asked appellant, ““Are you going to kill my wife, or kill me?”” Appellant, who appeared not to understand what was going on, replied, ““Naw, this isn’t our problem.””

An argument, accompanied by a good deal of yelling and cursing, ensued, and a second physical fight began between Keisha and Carraway, which lasted between five and eight minutes. Mikel was unable to separate them, and Keisha again began pounding Carraway’s head on the driveway. Andre finally pulled Keisha off Carraway.

After the fight ended, while appellant was talking to Andre, Carraway walked up to appellant and patted down his T-shirt and waist. Fowler and Ralls saw Carraway pat down Milk as well as appellant. As Carraway patted down appellant, she asked, ““Where’s the gun at? Where’s the gun at,”” and she stated that she was going to ““kill that bitch.”” Mikel heard Carraway tell appellant, ““I didn’t bring you here to fight him. I didn’t bring you here to talk to him. Do what I brought you here to do. Kill him.”” Fowler testified that Carraway screamed that she had not brought appellant there to not do anything, that she brought appellant there to ““F’ him up. To stab him. To beat him up, to shoot him, to kill him, to do something,”” and that Andre ““was not going to get away with this.”” Fowler heard Carraway say that Andre got Ralls pregnant and that “[s]omething needs to happen to him,” and that if Andre could not be with Ralls he would not be with Keisha either. Ralls testified that she heard Carraway yell, ““If you’re not going to do it, I’ll do it,”” and ““I thought y’all were going to whoop his ass.””

Andre asked, ““Oh, so what, you gonna shoot me?”” Keisha testified that Carraway replied that ““this is the person I brought to shoot your [wife],”” and that she, Carraway, was going to shoot Andre. Appellant, who appeared calm, brushed away Carraway’s hands as she patted him down and he continued to talk to Andre about what was going on.²

Fowler testified that she never saw any pushing, screaming, or hostility between appellant and Andre. Keisha testified that she saw appellant and Andre bumping chests

² Mikel testified that appellant passed an object to Milk after the fight and after Carraway patted down appellant.

and being aggressive with each other, and Fowler told police that appellant and Andre were pushing and shoving each other. At trial Fowler explained that they might have shoved each other but they were not aggressive, and that although appellant was pushing and shoving Andre, Andre “was like man, I don’t want to fight.”

Carraway and her entourage went back to their cars, and the Fishers and Fowler went back inside the house. Appellant did not appear angry or upset as he walked back to the car. Carraway angrily told appellant to “get his shit and leave” because he had not done what he came to do, and she threw out of Ralls’s car the extra shirt and jacket appellant had brought. Carraway asked Ralls and Pretlow where they were when she was fighting with Keisha.

Appellant did not get into any of the cars. Carraway shut the car door and repeatedly called the Fishers on the phone, telling “that bitch” to come out so she could beat her up. Carraway said Andre was going to be with Carraway’s friend and not with Keisha, that “Andre was going to get his,” and that she was going to hurt Andre. Her calls were answered by Fowler, Andre, and Mikel, each of whom hung up on her.

Mikel then looked out the window and saw appellant walking up the driveway, holding a gun. She informed Andre of this fact and hid Andre’s young son in a rear room. Fowler also saw appellant coming up the driveway. She did not see the gun at first, but when appellant got closer to the house she saw the gun in his hand. Keisha told Andre not to go out, but he stated that he could not have them living in fear, and he went out on the porch, holding the “grill door” open. As appellant came up the driveway, Carraway was yelling, ““Do it, and come on. Come on, come on, do it. You better do something. I didn’t bring you over here for this.”” Appellant said that the women should fight again. Andre told him that they had already fought again and Keisha had won the fight, and asked what else appellant wanted. Appellant, who was standing two or three feet from Andre, said, “I don’t want anything” or ““This is all I wanted,”” and fired four shots at Andre. Fowler, who observed appellant and Andre standing and talking, testified that when appellant pulled the gun, Andre, who had no weapon, did not jump on appellant or attack him.

Andre died as a result of multiple gunshot wounds. Three bullets were recovered from his body, and four expended .380-caliber shell casings were found at the scene.

As appellant ran back toward the cars, a police car came around the corner. Appellant jumped into Ralls's vehicle, got into the back seat, and ordered Pretlow to drive and to not stop. He said to Carraway, "I just got out of jail. Look what you got me into." The police followed, observing a man in the back seat of the car behind the driver. After the car went some distance, it stopped and appellant got out and fled. He eluded the pursuing police, but he was eventually apprehended at approximately 8:00 a.m. in a yard. The T-shirt and cap appellant had been wearing were found hidden under a van, and appellant was wearing a T-shirt taken from a nearby clothesline.

Appellant had two live .380-caliber rounds in his pocket. A .380 Davis Industries .380-caliber single-action blowback semiautomatic pistol was recovered from the trunk of Ralls's car. It could be seen through a gap in the back seat where the center armrest had been pulled down. A .380-caliber Davis Industries magazine designed to fit the pistol was found in the backyard of a residence on a street near where appellant had left Ralls's car. The bullets recovered from Andre's body and the expended casings found on the street had been fired from this weapon. The two live rounds found in appellant's pocket were the same type of ammunition and were made by the same manufacturer as the expended casings. Latent prints lifted from Ralls's vehicle matched those of appellant.

Defense Evidence

In defense, appellant testified that he considered Carraway his sister because they had grown up together, although they were not related. On the night of the shooting, Carraway called him and said she had been in a fight. When she arrived at the home where appellant was visiting his best friend, Milk, Carraway explained that she had fought Keisha on Ralls's behalf, that Andre had encouraged Keisha to fight her, and that Andre had held Carraway back so she could not defend herself. Appellant believed that Carraway had been beaten up in an unfair fight, and he agreed to go back with Carraway

so she could get a fair fight and so he could find out “what was really going on.”³ His friend Milk decided to go also, following in his own car, although he had company at home.

Appellant went back to his house first and picked up a gun, which he had found some months earlier on his way home from college and had buried in his yard. He brought it for protection, since Carraway had told him that it was a “heated situation.” He was wearing three shirts and a jacket, his customary outfit, but he took off one shirt and the jacket in the car because it was stuffy. When asked what role Carraway wanted him to play in going to the Fishers’ house, appellant replied that he was not sure because he really was not paying attention and just wanted “to know the story myself before I throw myself into a situation like that.” He subsequently testified, however, that Carraway brought him there to fight and that she thought he was going to fight. The women were aware that he had a gun with him, and all three women told him he should beat Andre up.

When they arrived at the Fishers’ residence, Keisha and Andre “stormed” out of the house.⁴ Keisha asked what “this bitch” was doing there, stating she had “already beat her ass,” and Andre asked, “What the fuck are you -- over here for? What, you want to get down with me?” Appellant took this to mean “do you want to fight with me?” Appellant was unaware that Carraway and Keisha had had prior confrontations. Appellant asked Andre what had happened, and Andre replied that he should not worry about it because it was “bitch stuff.” Appellant tried to find out more, but Carraway and Keisha began fighting, and the situation became chaotic.

³ Appellant first testified that Carraway wanted him to go to the Fishers’ house with her. He subsequently testified that Carraway did not ask him to go to the Fishers’ but that he asked Carraway to bring him there so he could find out what was going on.

⁴ Although Andre came towards him and stood a foot from him, appellant acknowledged that he did not pull out his gun at that time.

Appellant and Andre, who was larger than appellant, exchanged angry words, but neither hit the other, and they were not bumping chests. Appellant gave the gun to Milk because he did not want anyone to get hurt. After the fight, while appellant was still talking to Andre, Carraway, who was very upset, began patting appellant's clothing. He told her he did not have a gun. Andre asked appellant if he was going to shoot him. Appellant said that no one was going to shoot, because no one had a gun. Milk, who had not returned to the car with the gun, slipped it back into appellant's pocket and told appellant that he was leaving.

Appellant grabbed Carraway, who was still yelling, and brought her back to Ralls's car, where the other two women were also headed. He testified that Carraway was not angry with him and she did not throw his shirt and jacket out of the car. He then went back to speak with Andre in order to understand what was going on, which he had been unable to do because of the noise and confusion. He heard the women in the car "talking trash," but did not pay attention to what they were saying. He took the gun because he did not want to leave it in the car.

Andre, who had gone inside, "burst" out of the house, and appellant, who was "scared for [his] life," pulled out the gun, intending to stop Andre from coming toward him. Andre grabbed the gun. Appellant pushed Andre off him and fired the gun. His finger was already on the trigger, and the gun had no safety. Appellant was scared when he fired the gun, thinking that Andre might have armed himself when he went inside after realizing that appellant might have brought a gun. Appellant did not intend to fire the weapon or to kill or hurt Andre when he fired the shot, but only to stop him. At the time, he heard Ralls and Pretlow yelling, "'Shoot him, shoot him, do something to him, beat him.'"

Appellant fled and hid all night in a garage, but he did not resist when he was approached by the police. He first told police that Andre had been shot by someone else, because he was scared. However, he then told the officer the truth. He told the police that Carraway told him she wanted him to beat Andre up but she never told him to shoot anyone.

Carraway, who was tried together with appellant,⁵ testified in her own defense that Ralls came over and told her about the confrontation she had had with Keisha. Carraway agreed to accompany Ralls back to the Fishers' house even though the situation was awkward, because she was not only Ralls's friend but she was dating Andre's sister Mikel. Carraway fought with Keisha because Keisha provoked her, not because she was standing in for the pregnant Ralls.

After Carraway was beaten up by Keisha and was treated at the hospital, Ralls and Pretlow spoke about finding someone to beat up Andre. Carraway called Milk, who called appellant. Appellant was waiting when they arrived at Milk's home. When she explained to appellant that Ralls wanted him to fight Andre, he did not want to do it, since he did not know Ralls. However, he agreed to go to the Fishers' place because he wanted to know what had happened to Carraway. She had given him only enough information to cause him to believe she needed assistance, and she knew he was confused about what was going on. She also testified, however, that appellant agreed to fight Andre. Carraway was angry at Andre because of how he treated Ralls. She knew appellant had something heavy in his pocket but when she asked what it was he said, "Nothing," and she did not pay a lot of attention to it.

Carraway testified that after she fought again with Keisha, and she saw that Keisha was standing next to Andre while he was talking to appellant, she patted appellant's waist and asked if he had his gun. He said no, and she "left it alone." She was angry with appellant, because he only talked with Andre, when she wanted appellant to fight with Andre. She was angry when appellant walked her back to the car, because she had been hurt in two fights, and the fact that appellant had not fought Andre made her more angry. She told appellant to get his things and leave, but she did not throw his things from the car. She saw appellant fire the gun. At the time, he was standing three or four feet away from Andre. She claimed she did not yell that he should hurry and do it and that she did

⁵ Carraway is not a party to this appeal. It appears that the jury was unable to reach a verdict as to Carraway and a mistrial was declared.

not tell him to shoot Andre. She asserted that appellant's decision to kill Andre had nothing to do with her. She acknowledged that she told police that appellant was holding the gun sideways when he fired at Andre, although at trial she claimed she could not see how he held it.

DISCUSSION

Appellant contends that the evidence does not support his conviction of second degree murder because it fails to establish that he acted with either express or implied malice. This contention is without merit.

On appeal, we determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citations.] We examine the record to determine ‘whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] Further, ‘the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] This standard applies whether direct or circumstantial evidence is involved.” (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) A judgment will not be reversed for insufficiency unless “upon no hypothesis whatever is there sufficient . . . evidence to support [the conviction].” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

We have set forth at length the facts that were placed before the jury, and we conclude that on these facts, a rational trier of fact could have found appellant guilty of second degree murder.

“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.’ [Citations.] . . . [¶] ‘Malice may be either express or implied. It is express when the defendant manifests “a deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) It is implied . . . “when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of

another and who acts with conscious disregard for life” [citation].” (*People v. Taylor* (2004) 32 Cal.4th 863, 867.)

The jury was instructed on the definitions of express and implied malice, on first degree willful, deliberate and premeditated murder, on unpremeditated murder of the second degree and on second degree murder resulting from an unlawful act dangerous to life, as set forth above, and on voluntary manslaughter on the theories of heat of passion and imperfect self-defense.

Appellant argues that the evidence demonstrated that he did not know anybody at the scene except Carraway and Milk and he was unaware of the relationships between the individuals present at the time he shot Andre; that Carraway misrepresented the facts when she asked for his assistance, falsely telling him that Andre had prevented her from defending herself during her fight with Keisha; that he consistently exercised restraint and attempted to defuse the situation; and that he went back to determine from Andre what had happened and only shot Andre because he feared for his own safety. Thus, he claims, there was no evidence of express malice. He further argues, citing *People v. Nieto Benitez* (1992) 4 Cal.4th 91 (*Nieto Benitez*), that there was insufficient evidence of implied malice because, in contrast to the defendant in that case, his contact with Andre was motivated only by an attempt to understand the events of the day, rather than by a dispute or by personal animus.

Appellant’s attempts to convince us that his explanation of events is credible are simply a request that we reweigh the evidence, which is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) “[I]t is the *jury*, not the appellate court, which must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.) Moreover, with respect to circumstantial evidence, “[a]lthough it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] ““If the

circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"" [Citation.]" (*People v. Catlin, supra*, 26 Cal.4th at p. 139.)

Viewed in accordance with the appropriate standard, the evidence amply supports a finding of express malice. Indeed, the evidence could well have supported a finding of deliberate and premeditated murder. Although no one besides appellant and Carraway testified as to what the two of them discussed before they set off for the Fishers' house, the evidence established that appellant brought a loaded firearm with him when he accompanied Carraway back to the Fishers'. When the fight between Keisha and Carraway ended, Carraway and her party returned to their cars and the Fishers returned to their house. Appellant either retrieved his gun from the car, where his friend had put it, or he already had it in his pocket. Goaded by Carraway, he returned to the house, holding the gun in his hand. When Andre came out, appellant shot Andre four times from a distance of three or four feet. Fowler testified that Andre did not move toward appellant at the time. Although Carraway testified otherwise at trial, she told the police shortly after the shooting that appellant held the gun sideways when he fired it, an indication of a purposeful shooting. The jury was not required to accept appellant's and Carraway's assertions that she had merely asked him to fight with or beat up Andre, particularly in light of the facts that he went home to obtain a loaded gun before going to the Fishers' house and that Carraway was heard to say she brought appellant there to kill Andre. Based on the evidence before it, the jury could well have determined that appellant acted with express malice.

Similarly, the jury could also have found that appellant harbored implied malice. In *Nieto Benitez, supra*, 4 Cal.4th 91, the Supreme Court held that a jury may determine whether, under the circumstances, a defendant's act of brandishing a firearm posed a sufficient danger to human life to establish that he acted with implied malice. (*Id.* at pp. 96-97.) Here, after the fight was over and the Fishers went back into their house, appellant walked up to Andre's door holding a gun. He pointed it at Andre, holding his

finger on the trigger, when the victim came out. The jury could well have found, in light of the events that preceded this act, that the natural consequences of appellant's act of brandishing the firearm were dangerous to human life and that appellant brandished it with knowledge of the danger to, and with conscious disregard for, human life.⁶ (See *People v. Summers* (1983) 147 Cal.App.3d 180, 182-183, 184-185.)

Substantial evidence supports the jury's verdict.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST

⁶ The jury is not required to unanimously agree on the theory of malice, whether express or implied. (*People v. Brown* (1995) 35 Cal.App.4th 708, 715-716.)